PD-0276-18
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 7/24/2018 10:41 AM
Accepted 7/24/2018 1:20 PM
DEANA WILLIAMSON
CLERK

NO. PD-0275-18

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
7/24/2018
DEANA WILLIAMSON, CLERK

SHANNA LYNN HUGHITT, *Appellant*

v.

THE STATE OF TEXAS, *Appellee*

ON APPEAL FROM BROWN COUNTY

APPELLANT'S REPLY BRIEF

James Stafford
State Bar No. 18996900

515 Caroline Street
Houston, Texas 77002
713-228-3600 (phone)
713-223-3934 (fax)
keyserstaf@aol.com

Counsel for Appellant

IDENTITY OF JUDGE, PARTIES AND COUNSEL

Parties to the trial court's judgment:

Shanna Lynn Hughitt, Appellant
The State of Texas

Trial Judge:

Hon. Stephen Ellis, Presiding Judge, 35th District Court, 200 S. Broadway, Ste. 212, Brownwood, Texas 76801

Counsel for Appellant on appeal and before this Court:

James Stafford, 515 Caroline St., Houston, Texas, 77002

Counsel for Appellant at trial:

Stuart Holden, P.O. Box 633, Ballinger, Texas 76821

Counsel for the State before this Court:

Emily Johnson-Liu, Assistant State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711

Counsel for the State on appeal:

Elisha Bird, Assistant District Attorney, 35th Judicial District Attorney's Office, 200 S. Broadway, Ste. 323, Brownwood, Texas 76801

Counsel for the State at trial and at hearing on motion for new trial:

Elisha Bird and Christina Nelson, Assistant District Attorneys, 35th Judicial District Attorney's Office, 200 S. Broadway, Ste. 323, Brownwood, Texas 76801

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

STATUTES

SESSION LAWS

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

STATEMENT OF THE CASE

Ms. Hughitt was indicted by a grand jury for engaging in organized criminal activity (EOCA) and possession of a controlled substance with the intent to deliver between four and 200 grams of methamphetamine, and she pled not guilty to the charges against her. (CR1 15, 45; CR2 13, 33).[1] At a pretrial hearing, Ms. Hughitt filed a motion to quash the indictment in Cause Number 23116 (EOCA), arguing that possession with intent to deliver cannot be the basis for an EOCA charge. The trial court denied her motion. (CR1 49, 54).

A jury found Ms. Hughitt guilty of both charges. (CR1 234-237; CR2 156-59). The judge sentenced her to 18 years of confinement for the EOCA charge, and 10 years for the possession charge, with the sentences to run concurrently. (CR1 249-51; CR2 169-71). Ms. Hughitt filed a motion for new trial, which was denied after a hearing. (CR1 275; CR2 194).

On appeal, Ms. Hughitt challenged the trial court's ruling on the motion to quash, as well as the sufficiency of the evidence supporting both the EOCA and possession convictions, and the effectiveness of her trial counsel's representation. The Court of Appeals dismissed the indictment for EOCA, on the grounds that it

[1] The notation "CR1" refers to the Clerk's Record in trial court cause number CR-23116 (EOCA); the notation "CR2" refers to the Clerk's Record in trial court cause number CR-23242

failed to allege an offense, and vacated the judgment of conviction. *See Hughitt v. State*, 539 S.W.3d 531 (Tex. App. – Eastland 2018, pet. granted). The Court of Appeals also found that there was insufficient evidence to support a conviction for possession with intent to deliver methamphetamine in an amount between four and 200 grams; however, the Court found that the evidence was sufficient to support a conviction for possession with intent to deliver between one and four grams of methamphetamine, and remanded the case to the trial court for a new trial on punishment. *Id*. at *2.

The State filed a Petition for Discretionary Review, which was granted on one ground: whether possession with intent to deliver a controlled substance is included within "unlawful manufacture, delivery ... of a controlled substance," making it a predicate offense for engaging in organized criminal activity.

STATEMENT REGARDING ORAL ARGUMENT

The Court did not grant oral argument in this case.

STATEMENT OF FACTS

From August 2012 to May 2014, the Brown County Sheriff's Office conducted an investigation called Operation Tangled Web, which focused on identifying and arresting methamphetamine dealers. (RR VI 239-40; RR VII 10).[2] In November 2013, Kevin Sliger, the father of one of Ms. Hughitt's children, became a target of the investigation. (RR VI 241-42; RR VII 10). Police officers believed Ms. Hughitt and Mr. Sliger were involved in a romantic relationship; however, several witnesses, including Mr. Sliger, testified that their relationship was, at most, "on-again, off-again." (RR VII 11-12, 166-68, 228, 242-43). Mr. Sliger also testified that he was in and out of prison from 2003 until Ms. Hughitt's trial, at which time he was incarcerated on charges stemming from Operation Tangled Web. (RR VII 140-43).

On January 15, 2014 officers served a search warrant by breaking down the door of a residence. (VII 15, 18-21, 102; VIII 100-102). When officers entered the residence, both Mr. Sliger and Ms. Hughitt were present; however, Mr. Sliger was sleeping in a room towards the front of the house, near the living room, and Ms. Hughitt was sleeping in a bedroom in the back of the house. (RR VII 21-22; VIII 103). The police found a meth pipe and a gallon-sized zip-lock bag on the bed near

[2] The notation "RR" refers to the Reporter's Record for trial court cause numbers CR-23116 and CR-23242.

Ms. Hughitt, and a little more than 1 gram of meth in her bra. (RR VII 29, 36-37, 125; VIII 106; State's Exhibit 1-B).

When police searched Mr. Sliger, they found over 14 grams of methamphetamine, approximately 32 grams of "cut," over three grams of cocaine, four morphine tablets, and $44 in cash in his pockets. (RR VII 25, 30, 124-26; State's Exhibits 1-A, 1-C, 1-D). They also found various zip-lock baggies, syringes, and scales in the living room and a container of "cut" in a cabinet. (RR VII 31, 35-46). During their search of the house, police found almost an ounce of marijuana on the top shelf of the closet in the room in which Ms. Hughitt was sleeping. (RR VII 30). Also in that room, police found $786 in cash in the pocket of a pair of men's jeans. (RR VII 32). As a result of the raid, Ms. Hughitt was indicted by a grand jury for engaging in organized criminal activity and possession of a controlled substance with the intent to deliver between four and 200 grams of methamphetamine.

SUMMARY OF THE ARGUMENT

The appellate court correctly dismissed the engaging in organized criminal activity (EOCA) indictment against Ms. Hughitt, because the offense of possession with intent to deliver is not a proper predicate offense for EOCA. *See* TEX. PEN. CODE § 71.02(a)(5). While section 71.02 enumerates several offenses that can

serve as the basis for a charge of EOCA, possession with intent to deliver is not one of them. Throughout its history, section 71.02 has never included possession with intent to deliver as a predicate offense for an EOCA conviction.

Despite the State's urging to do so, there is no reason to move beyond a plain reading of section 71.02 and consider it in conjunction with Health and Safety Code section 481.112, as the EOCA statute does not reference the Health and Safety Code. Further, any EOCA charge based on a possession offense requires that the possession be the result of forgery, fraud, misrepresentation, or deception, which has not been proven in this case. Because the appellate court correctly dismissed the EOCA indictment, this Court should affirm its decision.

ARGUMENT

The Court of Appeals correctly found that Ms. Hughitt's conviction for engaging in organized criminal activity (EOCA) could not stand, because the offense of possession with intent to deliver is not a proper predicate offense for EOCA under Penal Code section 71.02.

Section 71.02(a) lists many offenses that can serve as the basis for an EOCA charge. Among those offenses are the "unlawful manufacture, delivery, dispensation, or distribution of a controlled substance or dangerous drug, *or* unlawful possession of a controlled substance or dangerous drug through forgery,

fraud, misrepresentation, or deception." TEX. PEN. CODE § 71.02(a)(5) (emphasis added). While the separate crimes of both delivery and possession of a controlled substance or dangerous drug appear in the statute as predicate offenses for an EOCA charge, possession with intent to deliver does not appear anywhere in section 71.02(a), even though it is a distinct crime. Further, any EOCA charge based on a possession offense requires that the possession be the result of forgery, fraud, misrepresentation, or deception. *Id*. Mere possession of a controlled substance is not a predicate offense under the organized crime statute. *Garcia v. State*, No. 03-04-00515-CR, 2006 WL 1041124 at *1 (Tex. App. – Austin Apr. 20, 2006, no pet.) (mem. op., not designated for publication).

Throughout the course of this case, the State has repeatedly argued that, in reading section 71.02(a), one should also refer to section 481.112 of the Texas Health and Safety Code, which criminalizes possession with intent to deliver. *See* TEX. HEALTH & SAFETY CODE § 481.112 (stating that a person commits the offense of manufacture or delivery of a controlled substance if the person "knowingly manufactures, delivers, or possesses with intent to deliver a controlled substance..."). However, because nothing in Penal Code section 71.02(a) references the Health and Safety Code, there is no reason to read the statutes together.

A plain meaning interpretation of the statute

This Court has held that a statute must be construed in accordance with the plain meaning of its text unless the language of the statute is ambiguous or the plain meaning leads to absurd results that the legislature could not possibly have intended. *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991). As the State noted in its brief, this Court recently reminded us that only in the case of ambiguity or absurd results can a court consider extratextual factors including the circumstances under which the statute was enacted, the legislative history, and common law or former statutory provisions. *See Oliva v. State*, No. PD-03980-17, 2018 WL 2329299 at *2 (Tex. Crim. App. May 23, 2018). A reviewing court may also take into account any prior caselaw construing a statute. *Williams v. State*, 273 S.W.3d 200, 215 (Tex. Crim. App. 2008). Because no danger of ambiguity or absurd results exists in this case, there is no need to go beyond the plain language of the EOCA statute to determine its meaning.

Section 71.02(a)(5) mentions both "delivery" and "possession" as means of committing the offense of engaging in organized criminal activity. TEX. PEN. CODE § 71.02(a)(5). However, it is imperative to note that possession is only criminalized under the EOCA statute if it is committed "through forgery, fraud, misrepresentation, or deception." *Id*. More importantly, there is absolutely no mention of "possession with intent to deliver" as a predicate offense in the EOCA

statute. Further, while other Organized Crime statutes cross-reference the Health and Safety Code, section 71.02 has never done so. *See* TEX. PENAL CODE § 71.023 (referring to multiple sections of the Health and Safety Code, including section 481.112, as predicate offenses for the crime of Directing Activities of Criminal Street Gangs). If the legislature intended for the EOCA statute to be read in conjunction with the Health and Safety Code, it could have referenced the Health and Safety Code in section 71.02, just as it did in section 71.023.

The State recognized this anomaly in its brief, and noted that section 71.023 "references its own manufacture and delivery predicate offense by section number" and "necessarily includes possession with intent to deliver." *See* State's Brief on the Merits, p. 18. Perhaps, as the State acknowledges, the legislature intended for possession with intent to deliver to be a predicate offense for EOCA for gang leaders, but not members. The fact remains that while the legislature clearly could have referenced section 481.112 in the EOCA statute, just as it did in section 71.023, it did not. Because the EOCA statute does not reference the Health and Safety Code, there is no obvious reason to read the two together.

Arguably, it is possible that a reader of the EOCA statute would reference Chapter 481 of the Health and Safety Code in search of a definition of the words "delivery" and "possession," which are admittedly not defined in the EOCA statute. However, the definition of "possession" in section 481.002 does not

include possession with intent to deliver. *See* TEX. HEALTH & SAFETY CODE § 481.002(38). The only place possession with intent to deliver is mentioned is in section 481.112, which discusses the general crime of "manufacture or delivery" of a controlled substance. *See* TEX. HEALTH & SAFETY CODE § 481.112.

Because possession with intent to deliver is not a form of manufacture, it would have to be a form of delivery. However, the definition of "deliver" in Section 481.002 requires the actual or constructive transfer of a controlled substance from one person to another, not just the act of possessing a controlled substance. TEX. HEALTH & SAFETY CODE § 481.002(8); *see State v. Foster*, No. 06-13-00190-CR, 2014 WL 2466145 at *2 (Tex. App. – Texarkana June 2, 2014, pet. ref'd) (mem. op., not designated for publication) (discussing the meaning of "delivery" and concluding that possession with intent to deliver does not equate to delivery). So, even if a reader turned to the Health and Safety Code for the definition of "delivery," that definition would not support the conclusion that possession with intent to deliver is a proper predicate offense for an EOCA charge. Further, at least one court has held that mere possession of a controlled substance is not a predicate offense under the organized crime statute. *Garcia v. State*, No. 03-04-00515-CR, 2006 WL 1041124 at *1 (Tex. App. – Austin Apr. 20, 2006, no pet.) (mem. op., not designated for publication)

The fact remains that, under a plain reading of Section 71.02, neither possession with intent to deliver nor possession are enumerated predicate offenses for an EOCA charge. Therefore, the appellate court correctly vacated Ms. Hughitt's conviction, and this Court should affirm that decision.

The State's broad interpretation of the statute

Despite the State's claim that its analysis "does not go beyond a strict textualist, 'plain language' interpretation" of the EOCA statute, the State urges this Court to look beyond the plain meaning of the EOCA statute and analyze its meaning at the time it was passed, as well as the interplay between various clauses of the EOCA statute and the Health and Safety Code. But as discussed above, because section 71.02 is not ambiguous, there is no need to look further than the words of the statute itself to determine that possession with intent to deliver is not a proper predicate offense for the crime of EOCA. However, even if the reader moves beyond a plain reading of the statute, the State's arguments fail.

The State argues that the phrase "unlawful manufacture or delivery...of a controlled substance" must be interpreted as it would have been understood at the time the statute was written. *See* State's Brief on the Merits, p. 9. To support this argument, the State refers to section 4.03 of the Controlled Substances Act, which existed at the time the orginal EOCA statute was created, and evolved into what is now known as the Health and Safety Code. In discussing the evolution of the

Controlled Substances Act, the State notes that "[i]n each version [of the Act]...possession with intent to deliver was included within the offense of 'Manufacture or Delivery.'" *See* State's Brief on the Merits, pp. 9-10; *see also* Act of 1973, 63rd Leg., R.S., ch. 429, 1973 Tex. Gen. Laws 1132, 1153 (eff. Aug. 27, 1973), attached to the State's Brief on the Merits as Appendix B. The State seems to imply that because the definition of "manufacure or delivery" in the Health and Safety Code has always included possession with intent to deliver, that definition should apply to the EOCA statute. The State also argues that because some of the clauses in the EOCA statute contain language similar to those in the Health and Safety Code, the definition of "manufacture or delivery" from the Health and Safety Code should be applied to the EOCA statute. *See* State's Brief on the Merits, pp. 13-16.

Despite the State's insistence, the definition of "manufacture or delivery" that appears within the Health and Safety Code is not applicable to the EOCA statute. The bottom line remains that the current version of Penal Code section 71.02 does not refer back to the Health and Safety Code, just as past versions did not. Moreover, since its inception, section 71.02 has never included possession with intent to deliver as a predicate offense for an EOCA conviction.

The first version of the Organized Criminal Activity statute, which was created in 1977, reads exactly as the statute does today. In the original version,

section 71.02(a) stated that a person committed the offense of EOCA if he committed or conspired to commit, among other crimes, the "unlawful manufacture, delivery, dispensation, or distribution of a controlled substance or dangerous drug, or unlawful possession of a controlled substance or dangerous drug through forgery, fraud, misrepresentation, or deception." *See* Act of 1977, 65th Leg., R.S., ch. 346 § 1, 1977 Tex. Gen. Laws 922 (S.B. 151) (eff. June 10, 1977), attached to the State's Brief on the Merits as Appendix A. Section 71.02(a) remains unchanged to this day. Surely if the legislature had intended for the EOCA statute to include possession with intent to deliver as a predicate offense, it would have changed the statute accordingly sometime over the last 30 years. Instead, the statute has remained the same and still does not include possesion with intent to deliver as an enumerated predicate offense for a charge of EOCA.

In addition to analyzing the history of the EOCA statute and the Health and Safety Code, the State urges this Court to consider *Nichols v. State*, 653 S.W.2d 768 (Tex. Crim. App. 1981), where the appellants asserted that the language of section 71.02 was vague because "deliver" and "controlled substance" were not defined in the Penal Code. In finding "no vagueness," the Court stated that the references in section 71.02(a)(5) to "unlawful manufacture, delivery, dispensation, or distribution of a controlled substance or dangerous drug, or unlawful possession of a controlled substance or dangerous drug through forgery, fraud,

misrepresentation, or deception are necessarily references to those offenses as defined in the Controlled Substances Act and the Dangerous Drugs Act." *Id*. at 771 (internal quotes omitted).

As discussed above, because a plain reading of the statute in this case is not vague, it is not necessary to refer to outside sources such as caselaw to determine its meaning. However, even if this Court considers *Nichols* in its deliberations, the fact still remains that the offense of possession with intent to deliver cannot form the basis of an EOCA charge unless it is shown that the possession was the result of forgery, fraud, misrepresentation, or deception. Again, that has not occurred in this case, so the charges against Ms. Hughitt would not stand because there is no proof that she possessed a controlled substance as the result of forgery, fraud, misrepresentation, or deception.

Other courts' interpretation of the EOCA statute

In its opinion, the Court of Appeals in this case rejected the State's argument that possession with intent to deliver is encompassed within the meaning of "delivery" found in section 71.02. *Hughitt*, 531 S.W.3d at 536-37. The court noted that two other appellate courts have recently held that possession with intent to deliver is not a proper predicate offense for EOCA under section 71.02(a). *See Walker v. State*, No. 07-16-00245-CR, 2017 WL 1292006 at *2 (Tex. App. – Amarillo Mar. 30, 2018, pet. granted) (mem. op., not designated for publication);

State v. Foster, No. 06-13-00190-CR, 2014 WL 2466145 at *2-3 (Tex. App. – Texarkana June 2, 2014, pet. ref'd) (mem. op., not designated for publication). Since the Court of Appeals' opinion was handed down in this case, at least one other appeal has been decided with the same conclusion. *See Parker v. State*, No. 06-17-00167-CR, 2018 WL 1733969 at *3-4 (Tex. App. –Texarkana April 11, 2018, pet. granted) (mem. op., not designated for publication).

In *Foster*, the State presented the same argument that is offered in this case – that in order to determine the meaning of "delivery" in Section 71.02 of the Penal Code, one should read the EOCA statute in conjunction with section 481.112 of the Health and Safety Code. *Foster*, 2014 WL 2466145 at *2. The court summed up the State's argument as follows: because all methods of violating section 481.112 constitute either manufacture or delivery of a controlled substance, and possession with intent to deliver cannot constitute a form of manufacture, it must constitute "delivery." *Id*. at *2. By incorporating the meaning of "delivery" under section 481.112 into the EOCA statute, possession with intent to deliver becomes one means of violating the statute's proscription against delivery of a controlled substance. *Id*.

The court in *Foster* dismissed the State's logic, and pointed out that the legislature defined the term "deliver" in section 481.002 of the Health and Safety Code, and that definition is at odds with the State's proposed definition. *Id*.; *see*

TEX. HEALTH & SAFETY CODE § 481.002. The court noted that under section 481.002, "deliver" means to transfer, actually or constructively, to another a controlled substance, and that this definition "simply does not include the act of possessing a controlled substance, even if your intent is to later deliver that substance." *Foster*, 2014 WL 2466145 at *2. Rather, said the court, "it requires something more than mere possession with the intent to later transfer it; it requires an act in furtherance of that intent." *Id*. Recently, in *Parker*, the Texarkana court relied on *Foster* to reach the same conclusion, that possession with intent to deliver does not constitute a predicate offense necessary to support a conviction for EOCA. *Parker*, 2018 WL 1733969 at *3-4. Prior to that, *Walker* agreed with *Foster's* holding. *Walker*, 2017 WL 1292006 at *2.

Following the analysis of the court in *Foster*, the Court of Appeals in this case held that "possession with intent to deliver does not constitute a proper predicate offense for engaging in organized criminal activity under section 71.02(a)," and vacated Ms, Hughitt's EOCA conviction. *Hughitt*, 539 S.W.3d at 537. For the reasons discussed above, this Court should apply the same logical analysis and affirm the appellate court's decision.

CONCLUSION

The appellate court correctly dismissed the engaging in organized criminal activity (EOCA) indictment against Ms. Hughitt, because the offense of possession with intent to deliver is not a proper predicate offense for EOCA under Penal Code section 71.02. As such, this Court should affirm the decision of the court of appeals.

PRAYER FOR RELIEF

Ms. Hughitt respectfully requests that this Court affirm the judgment of the Court of Appeals, which vacated the trial court's judgment of conviction for engaging in organized criminal activity.

Respectfully submitted,

/s/ James Stafford
JAMES STAFFORD
515 Caroline Street
Houston, Texas 77002
713-228-3600 (phone)
713-223-3934 (fax)
State Bar No. 18996900
keyserstaf@aol.com

CERTIFICATE OF COMPLIANCE

This is to certify that, in compliance with Tex. R. App. P. 9.4(i)(1), the relevant portion of the brief contains 3,184 words based upon a word count under Microsoft Word.

/s/ James Stafford
JAMES STAFFORD
515 Caroline Street
Houston, Texas 77002
713-228-3600 (phone)
713-223-3934 (fax)
State Bar No. 18996900
keyserstaf@aol.com

CERTIFICATE OF SERVICE

Appellant has transmitted a copy of the foregoing brief to parties below via electronic mail:

Stacy M. Soule
Emily Johnson-Liu
Assistant State Prosecuting Attorneys
information@spa.texas.gov

Elisha Bird
Assistant District Attorney, 35th Judicial District Attorney's Office
elisha.bird@browncountytx.org

/s/ James Stafford
JAMES STAFFORD
515 Caroline Street
Houston, Texas 77002
713-228-3600 (phone)
713-223-3934 (fax)
State Bar No. 18996900
keysterstaf@aol.com

Date: July 23, 2018